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FILED
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No. 82-347

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

IN THE MATTER OF LEGISLATIVE DISTRICTING
OF THE STATE OF MARYLAND

C. LAWRENCE WISER,

Appellant,

v.

HARRY R. HUGHES, *et al.*,

Appellees.

On Appeal From The Court Of Appeals Of Maryland

MOTION TO DISMISS OR AFFIRM

FUREY, DOOLAN, ABELL & HOGAN
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Legislative Delegation

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D.C.

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No. 82-347

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1982

IN THE MATTER OF LEGISLATIVE DISTRICTING OF THE STATE OF MARYLAND

C. LAWRENCE WISER,

Appellant,

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Apellees

ON APPEAL FROM THE COURT OF APPEALS OF MARYLAND

MOTION TO DISMISS OR AFFIRM

Senators Victor L. Crawford, Howard A. Denis, Sidney Kramer, Lawrence Levitan, Margaret C. Schweinhaut, and S. Frank Shore, and Delegates Stewart Bainum, Jr., Mary Boergers, Joel Chasnoff, Jennie M. Forehand, Idamae Garrott, Marilyn

Goldwater, Sheila Ellis Hixson, Jerry H. Hyatt, Nancy K. Kopp, Helen L. Koss, Lucille Maurer, Constance A. Morella, Joseph E. Owens, Donald B. Robertson, Ida G. Ruben, Patricia R. Sher and Judith C. Toth, members of the Montgomery County Legislative Delegation to the General Assembly of Maryland[1] (hereinafter collectively referred to as the "Montgomery County Legislative Delegation"), by and through their attorneys, W. Shepherdson Abell and Marianne K. Renjilian, move this Court pursuant to Rule 16 for an Order dismissing the appeal or, in the alternative, summarily affirming the Per Curiam Order appealed from, which was entered by the Court of Appeals of Maryland on June 4, 1982. In the

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[1] Two members of the Delegation did not participate in the proceedings below, and do not join in this Motion.

alternative, should the Court treat Appellant Wiser's appeal as a petition for writ of certiorari pursuant to 28 U.S.C. §2103, the Delegation prays that the Court treat this Motion as a Brief in Opposition filed pursuant to Rule 22.1, and deny the petition.

STATEMENT OF FACTS

This case involves the 1982 decennial state legislative redistricting of the State of Maryland, and in particular, the redistricting of Montgomery County, Maryland. Appellant Wiser filed one of ten petitions seeking review by the Court of Appeals of Maryland, in its original jurisdiction, of the redistricting plan proposed by Governor Harry R. Hughes and adopted by the bicameral Maryland General Assembly as H.J.R. 32, Acts of 1982. Article III, Section 5 of the Maryland

Constitution[2] provides that a plan so adopted "shall become law".

Two of the ten petitions filed with the Court of Appeals concerned the redistricting of Montgomery County. Appellant Wiser's petition was one of those two. The other was filed by Bruce A. Goldensohn, the Mayor of Gaithersburg, Maryland. The two petitions were consolidated. The Delegation's motion for leave to intervene as parties respondents with respect to the two consolidated petitions was granted by the Court of Appeals of Maryland on April 2, 1982.

A Special Master was appointed by the Court to hold hearings and make recommendations to it concerning disposition of the various petitions. After hearing, the Special Master issued a

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[2] The text of Article III, Section 5 is set out in the Appendix to this Motion at pages 1-3.

Report which is reproduced in part in Appellant's Appendix to Jurisdictional Statement at pages 5 to 48. The Special Master recommended, inter alia, that both petitions relating to Montgomery County be dismissed.

Appellant's exceptions to the Report were overruled, and the legislative districts were ordered to be as established in and by H.J.R. 32, by the Per Curiam Order entered by the Court of Appeals of Maryland on June 4, 1982, which is reproduced in Appellant's Appendix to Jurisdictional Statement (hereinafter cited as "App.") at pages 1 through 4. Petitioner Goldensohn's exceptions were likewise overruled. No appeal has been taken from the Order as it affected Petitioner Goldensohn's exceptions.

The reasons for the Court of Appeals decision are not stated in the Per Curiam Order; it states that those reasons are to be set forth in an opinion later to be

filed (App. at 3). To the date of the drafting of this Motion, no such opinion has been filed.

Insofar as any issues arising under the United States Constitution are concerned, the Per Curiam Order states only that "the petitions. . . failed to establish any violations of the federal constitution . . . ." (App. at 3).

A number of issues were raised below in connection with Appellant's petition. Most of those issues were predicated on alleged violations of Article III, Section 4 of the Constitution of Maryland, the text of which is set out in the Special Master's Report. (App. at 19). Appellant's allegations of violation of the Fourteenth Amendment were raised as stated in his Jurisdictional Statement, at pages 5 and 6. The Supplemental Memorandum filed April 14, 1982 and the pertinent portion of the Memorandum in Opposition to Report of the Special Master

filed May 26, 1982, to which Appellant refers, in his Jurisdictional Statement, are included in the Appendix to this Motion at pages 3-9 and 10-15, respectively.

The Special Master's Report deals with Appellant's equal protection arguments only in terms of the allegations relating to minimization of contests among incumbents. See App. at 35-38.

Insofar as Montgomery County is concerned, there were, in the Court below, no allegations of any racial, partisan, ethnic, religious, or economic discrimination arising as a result of the districting plan. It was undisputed that the districts, from each of which one Senator and three Delegates are to be elected, each included the residences of one incumbent Senator and three incumbent

Delegates.[3] It was also undisputed that the present incumbents include both Republicans and Democrats. The locations of the incumbents' residences vis-a-vis Randolph Road[4] were likewise undisputed; however, the significance of those locations was disputed, with the Delegation taking the position that they were irrelevant. See paragraphs 6 through

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[3] Since the Per Curiam Order appealed from was entered, the candidates' filing deadlines for the September 14, 1982 primary elections and the November 9, 1982 general election have come and gone. Two of the incumbent legislators--one Delegate and one Senator--are not seeking reelection; one incumbent Delegate is seeking election as a Senator. Appellant is not seeking election, despite his concession below that he would have liked to do so. See App. at 46, n.13.

[4] One of the highways which run roughly east-to-west through a portion (though not all) of Montgomery County, Maryland is Randolph Road. Appellant has in effect contended that, because all the incumbents live south of Randolph Road, a districting plan which avoids contests among those incumbents is inherently violative of the Equal Protection Clause.

11 of the Supplemental Affidavit of Helen L. Koss, reproduced in the Appendix to this Motion at pages 27-34. That Affidavit was submitted simultaneously with the Delegation's Reply Memorandum, which is reproduced in the Appendix to this Motion at pages 15-27, for the sake of completeness.

ARGUMENT

The Montgomery County Legislative Delegation respectfully submits that the appeal should be dismissed, or in the alternative that the Per Curiam Order appealed from should be summarily affirmed, for the following reasons.

I. PRELIMINARY OBSERVATIONS - THE QUESTIONS SOUGHT TO BE REVIEWED

Appellant has stated the question presented by his appeal as follows:

> "Whether gerrymandering of districts drawn for election of members of a state legislature is a denial of equal protection under the Fourteenth Amendment to

> the United States Constitution to those against whom the gerrymander is directed."

The Delegation submits that this statement of the questions involved here is over-broad and unclear.[5] Appellant does not define the word "gerrymandering", which is often used to describe any redistricting plan which the one using the word deems unsatisfactory. The term is frequently the epithet--and the last refuge--of disappointed office seekers.

Despite the lack of specific definition, as the Delegation understands Appellant's Jurisdictional Statement he appears to be discomfited primarily by the following matters:

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[5] If this appeal is treated as a petition for writ of certiorari pursuant to 28 U.S.C. §2103, the Delegation would respectfully draw the Court's attention to Rule 21.5 of the Rules of this Court, which requires "accuracy, brevity and clearness" in such petitions, and would submit that the petition should be denied.

a. the fact that each district is somewhat irregular in shape and contains the residences of one incumbent for each legislative seat to be filled by election; and

b. the fact that the districts extend both north and south of Randolph Road when most of the incumbent legislators (whose reelection Appellant deems a virtual certainty) live south of Randolph Road, and when (according to Appellant's allegations) most of the population growth in the County since the last redistricting has occurred north of Randolph Road.

II. THE FEDERAL QUESTION SOUGHT TO BE REVIEWED HAS NOT BEEN EXPRESSLY PASSED UPON, AND THE PER CURIAM ORDER MAY REST ON ADEQUATE NON-FEDERAL BASES

As noted in the Statement of Facts, supra, the Court of Appeals of Maryland has not, as of the date of drafting of this Motion, filed an opinion stating its

reasons for overruling Appellant Wiser's exceptions to the Report of the Special Master. The Per Curiam Order appealed from states, in pertinent part, only that the petitions failed to establish any violation of the federal Constitution. (App. at 3).

Additionally, it should be noted that the Special Master's Report dealt with Appellant's allegations of violations of the United States Constitution only insofar as they related to minimization of contests among incumbents. (App. at 35-38). Neither the Special Master nor the Court of Appeals has expressly passed upon Appellant's contentions relating to the location of incumbents' residences relative to "growth areas" in Montgomery County or relative to Randolph Road. It is not clear from the Per Curiam Order or from the Special Master's Report whether those contentions were believed to be constitutionally insignificant per se, or

whether, perhaps, there was found to be a failure by Appellant to present sufficient evidence or to carry his burden of proof on those matters. In any event, the Delegation submits that the appeal should be dismissed insofar as those matters are concerned, on the ground that they were not expressly passed upon below.

To the extent the Jurisdictional Statement may be deemed to raise any issue related to the constitutional propriety of the state legislature's involvement in the redistricting process, the Delegation submits that the appeal should be dismissed because no such issue was raised or passed upon in the Court below at any time.[6]

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[6] In any event, the Delegation submits that Maryland's constitutionally mandated reapportionment procedures set out in Article III, Section 5 of the Constitution of Maryland (Appendix to this Motion at pages 1-3) are entirely proper, and no substantial federal question requiring review could be raised in connection with them.

III. THE APPEAL DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION; IT IS MANIFEST THAT THE QUESTIONS ON WHICH DECISION OF THIS CAUSE RESTS ARE SO UNSUBSTANTIAL AS NOT TO NEED FURTHER ARGUMENT

The Montgomery County Legislative Delegation respectfully submits that the instant appeal should be dismissed on the merits or, in the alternative, that the Per Curiam Order entered June 4, 1982 should be summarily affirmed, because Appellant has failed to present a substantial federal question for review.

A. Irregularities of District Shape and Minimization of Contests Among Incumbent Legislators Do Not Per Se Establish Invidious Discrimination

The Delegation respectfully submits that neither Appellant's contentions relating to the shapes of the Montgomery County districts, nor his contentions relating to minimization of contests among incumbents, nor both in combination,

without more, present a substantial federal question for review.

Appellant, in his Jurisdictional Statement at pages 10 and 11, avers that the district boundaries in Montgomery County are "bizarre, remote and meandering" and that the districts "have legs that drop down." It is undisputed that the shapes of the districts are somewhat irregular.[7] See App. at 75, 76. In the proceedings below, the state constitutional requirement that districts be "compact in form" occupied considerable time and attention. See, e.g. App. at 20-32, 38-42. It seems clear from the authorities, however, that there is no federal requirement that state legislative

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[7] The reasons for the districts having being drawn as they were were presented at length to the Special Master and to the Court of Appeals of Maryland; those reasons included many factors other than the location of incumbents' residences.

districts be compact in form. See, e.g., Gaffney v. Cummings, 412 U.S. 735, 752 n.18 (1973). And the Maryland Court of Appeals has implicitly found that the state compactness requirement was met by H.J.R. 32. (App. at 3).

It was undisputed in the Court below that the challenged legislative districts in Montgomery County contained the residences of one incumbent--and no more--for each legislative seat to be filled by election. While the Court of Appeals has yet to express itself on this matter, the Special Master stated in his Report:

> "No evidence is to be found in the record that 'districting for incumbents' was the product of any plot, plan or scheme to diminish, dilute or cancel out the voting strength of any racial or political group. Neither is there any evidence that such is its effect.
>
> "There is no record evidence that the Legislative Plan conferred any special

handicap or special benefit to any incumbent other than may have been earned in the performance of duty during his term of office." App. at 37.

This Court has clearly stated that "[t]he fact that district boundaries may have been drawn in a way that minimizes the number of contests between present incumbents does not in and of itself establish invidiousness." Burns v. Richardson, 384 U.S. 73, 89, n.16, (1966). See also, White v. Weiser, 412 U.S. 783, 791, (1973). It is clear from the Special Master's Report that he found that nothing invidious, indeed nothing more than minimization of contests among incumbents itself, was shown in this case. The additional factor of irregular district shapes which meet a state compactness requirement does not, and cannot in the Delegation's view, transmute the well-settled law on this point into a substantial federal question requiring

review by this Court.

Accordingly, the Delegation submits that this appeal presents no substantial federal question in this regard, and that the law is so clear that it is manifest that there is no need for further argument as to this point. The Delegation thus respectfully requests that the appeal be dismissed or, in the alternative, that the Per Curiam Order be summarily affirmed.

B. Appellant's Contentions Concerning Representation of "Growth Areas" Fail to Present A Substantial Federal Question For Review

As noted above, neither the Court of Appeals nor the Special Master has to date issued a written opinion which directly addresses Appellant's contentions relating to Randolph Road and the alleged "growth areas" to the north of it. The Delegation respectfully submits that even had there been a ruling on these points, no substantial federal question requiring

further argument would be presented by this appeal.

Appellant has never cited, and the Delegation has been unable to discover, any decided case or other authority for the proposition that a federal equal protection claim--or any other justiciable claim--may be founded upon alleged discrimination between "growth areas" and "non-growth areas" of a County. In any event, the Special Master properly found that there was no evidence of invidious discrimination in this case. See App. at 37.[8]/

The essence of Appellant's dispute with the Court of Appeals' decision in this case regarding "growth areas" is

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[8]/ The "single exception" found by the Special Master did not relate to Montgomery County, and the Court of Appeals sustained the State's exceptions to the portion of the Special Master's Report which dealt with that "single exception". See App. at 3.

probably best gleaned from pages 21 through 24 of his Jurisdictional Statement. He says essentially two things, both of which the Montgomery County Legislative Delegation believes to be completely unsupported by law, fact, logic or sound constitutional philosophy: (1) that the purpose of reapportionment is to give geographical areas which have experienced population growth--as areas--"increased representation"; and (2) implicitly, that a legislator who lives in the southern part of Montgomery County cannot fairly represent constituents who live north of Randolph Road, that is, that "fair representation" requires that "up-County" residents be represented proportionately in the legislature and be represented by one of their own number.

The Delegation submits that it is clear that no substantial federal question requiring further argument is presented by

this appeal as to these matters. Even apart from the obstacles to review by this Court which arise because the facts of these matters were disputed[9] and because there has to date been no express ruling on them, the Delegation respectfully submits that the appeal should be dismissed on the merits as a matter of law.

It has clearly been stated by this Court that "people, not trees" are entitled to representation. Reynolds v. Sims, 377 U.S. 533, 562 (1964). Similarly, "areas", even "growth areas", are not entitled to representation; people are. In fact, the entire thrust of Baker v. Carr, 369 U.S. 186 (1962), and its

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[9] See page 8 of this Motion, supra, and the Supplemental Affidavit of Helen Koss (Appendix to this Motion at 27-34). As to disputes related to the existence and location of various "communities of interest" in Montgomery County, see the Special Master's Report (Appendix to this Motion at 37-38), and n.11, infra.

progeny was that, notwithstanding traditional representation of areas as areas, the Fourteenth Amendment requires equality of treatment for each prospective voter.

There is no claim in this case, nor could there be, that residents of any part of Montgomery County have been deprived of an equal vote in electing their legislators, or deprived of access to the political system. There was no dispute that the redistricting plan established by H.J.R. 32 meets federal constitutional requirements for population equality among districts, and the Special Master so found. (App. at 42). There was no evidence, nor could there be, that the value of any resident's vote is in any way debased by the fact that the redistricting plan permits all incumbents to run for re-election without opposing one another; every resident may cast an equally weighted vote for incumbents or for any

others who choose to run.[10] The Delegation submits that no substantial federal question is raised by Appellant's contentions relating to the purpose of reapportionment and the representation of "growth areas" *per se*.

Further, even had it been clearly established by Appellant--which it was not--that "up-County" residents were an identifiable political group distinct from "down-County" residents, no substantial federal question requiring further argument would be raised by Appellant's tacit contention that this group is entitled to proportional representation by

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[10] Appellant has proceeded as if the fact that all incumbents reside south of Randolph Road means that the redistricting plan has imposed some sort of residency requirement--that only candidates who live south of Randolph Road are eligible for election. But, of course, this is simply not so; anyone residing in any part of a given district can file for election, and the voters are free to decide.

one of their own number.[11] As this Court held in City of Mobile v. Bolden, 446 U.S. 55, (1980):

> "It is of course true that the right of a person to vote on an equal basis with other voters draws much of its significance from the

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[11] There was absolutely no evidence in this case supporting Appellant's apprehension that a legislator residing south of Randolph Road could not, or would not, if elected, adequately represent his or her "up-County" constituents. Logic, and political common sense, would seem to compel a contrary conclusion. See, in this connection, paragraph 10 of the Supplemental Affidavit of Helen Koss, set out in the Appendix to this Motion at pages 32-33. In his Supplemental Memorandum filed April 14, 1982 (Appendix to this Motion, at pages 3-9), Appellant alleged a violation of the Equal Protection Clause through division of alleged "communities of interest". That matter was not expressly ruled upon in connection with Appellant's Petition and is not raised in Appellants' Jurisdictional Statement, but it was responded to by the Delegation (Appendix to this Motion at pages 15-27) and the matter of claims related to alleged "communities of interest" was dealt with--and the claims were rejected--by the Special Master in connection with Mayor Goldensohn's Petition (Appendix to this Motion at pages 34-39).

> political associations that its exercise reflects, but it is an altogether different matter to conclude that political groups themselves have an independent constitutional claim to representation. And the Court's decisions hold squarely that they do not. See United Jewish Organizations v. Carey, 430 U.S. 144, 166-167, Id. at 179-180 (concurring opinion); White v. Regester, 412 U.S. 755, 765-766; Whitcomb v. Chavis, 403 U.S. 124, 149-150, 153-154, 156-157.
>
> The fact is that the Court has sternly set its face against the claim, however phrased, that the Constitution somehow guarantees proportional representation."

The Delegation submits that Appellant's claims under the Fourteenth Amendment were properly rejected by the Special Master and the Court of Appeals of Maryland. Those claims--however phrased--should likewise be summarily rejected by this Court.

IV. Conclusion

The Montgomery County Legislative Delegation respectfully submits that for all of the foregoing reasons, the instant appeal should be dismissed or, in the alternative, that the decision appealed from should be summarily affirmed, and the Delegation respectfully requests that the Court so Order.

Respectfully submitted,

FUREY, DOOLAN, ABELL & HOGAN

By: W Shepherdson Abell
W. Shepherdson Abell

By: Marianne K. Renjilian
Marianne K. Renjilian

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Counsel for Appellees
Montgomery County
Legislative Delegation

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 28th day of September, 1982, I caused three copies of the foregoing Motion to Dismiss or Affirm to be mailed, first class mail, postage pre-paid, to C. Lawrence Wiser, Petitioner, 10605 Concord Street, Suite 400, Kensington, Maryland, 20895; to Stanley D. Abrams, Esquire, 7315 Wisconsin Avenue, Air Rights 3, Suite 720 North, Bethesda, Maryland, 20814, Attorney for Petitioner Goldensohn; to Roger W. Titus, Esquire, City Attorney, 502 Suburban Bank Building, 255 N. Washington Street, P.O. Box 1906, Rockville, Maryland, 20850, Attorney for the Mayor and Council of Rockville, Amicus; to Linda Lamone, Assistant Attorney General, 104 Legislative Services Building, 90 State Circle, Annapolis, Maryland, 21401; and to Stephen H. Sachs, Attorney General, Diana G. Motz, Assistant Attorney General, Robert A. Zarnoch, Assistant Attorney General, and Mary N. Humphries, Assistant Attorney General, 1400 One South Calvert Building, Baltimore, Maryland, 21202.

W. Shepherdson Abell

W. Shepherdson Abell

No. 82-347

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1982

IN THE MATTER OF LEGISLATIVE DISTRICTING
OF THE STATE OF MARYLAND

C. LAWRENCE WISER,

Appellant,

v.

HARRY R. HUGHES, et al.,

Apellees

ON APPEAL FROM THE
COURT OF APPEALS OF MARYLAND

APPENDIX TO MOTION TO DISMISS OR AFFIRM

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CONSTITUTION OF MARYLAND,

ARTICLE III, SECTION 5:

Section 5. Legislative districting and apportionment following each decennial census.

Following each decennial census of the United States and after public hearings, the Governor shall prepare a plan setting forth the boundaries of the legislative districts for electing of the members of the Senate and the House of Delegates.

The Governor shall present the plan to the President of the Senate and Speaker of the House of Delegates who shall introduce the Governor's plan as a joint resolution to the General Assembly, not later than the first day of its regular session in the second year following every census, and the Governor may call a special session for the presentation of his plan prior to the regular session.

The plan shall conform to Sections 2, 3 and 4 of this Article. Following each decennial census the General Assembly may by joint resolution adopt a plan setting forth the boundaries of the legislative districts for the election of members of the Senate and the House of Delegates, which plan shall conform to Sections 2, 3 and 4 of this Article. If a plan has been adopted by the General Assembly by the 45th day after the opening of the regular session of the General Assembly in the second year following every census, the plan adopted by the General Assembly shall become law. If no plan has been adopted by the General Assembly for these purposes by the 45th day after the opening of the regular session of the General Assembly in the second year following every census, the Governor's plan presented to the General Assembly shall become law.

Upon petition of any registered voter, the Court of Appeals shall have

original jurisdiction to review the legislative districting of the State and may grant appropriate relief, if it finds that the districting of the state is not consistent with requirements of either the Constitution of the United States of America, or the Constitution of Maryland.

IN THE COURT OF APPEALS OF MARYLAND

IN THE MATTER OF	:	
LEGISLATIVE	:	September Term, 1982
DISTRICTING OF	:	Miscellaneous No. 2
THE STATE	:	

SUPPLEMENTAL MEMORANDUM OF PETITIONER

Petitioner alleged in item 15 of its Petition filed with the Court in this case that "The gerrymandering of legislative districts created in the Governor's Plan contravenes the Fourteenth Amendment to the Constitution of the United States, specifically due process and equal protection of the laws."

I. THE DIVISION OF AREAS WITH A COMMUNITY OF INTEREST DENIES EQUAL PROTECTION BECAUSE IT PREVENTS THOSE AREAS COMBINING TO ELECT REPRESENTATIVES OF THEIR COMMUNITY.

Petitioner dealt on pages 20 through 23 of its Memorandum previously submitted to this Court with the problem of the unnecessary division of communities of interest under the Governor's Plan. Petitioner contends that a division of a community of interest into different districts denies those in that community of interest equal protection under the laws because it denies them the opportunity to combine their efforts to elect representatives that reflect the views of their community of interest. This is exemplified in the Governor's Plan by the division of the Gaithersburg community of interest into four legislative districts and by the division of the Wheaton community of interest into

two districts.

II. GERRYMANDERING TO PROTECT INCUMBENT LEGISLATORS LIVING IN NON-GROWTH AREAS DENIES GROWTH AREAS EQUAL REPRESENTATION AND EQUAL PROTECTION.

In a leading case, the Supreme Court has ruled that "State legislative districts may be equal or substantially equal in population and still be vulnerable under the Fourteenth Amendment," Gaffney v. Cummings, 412 U.S. 735, 755, 93 S.Ct. 2321, 2330 (1973). The Court went on to say (citing Fortson v. Dorsey, 379 U.S. 433, 439, 855 S.Ct. 498, 501 (1965)

> A districting plan may create multimember districts perfectly acceptable under equal population standards, but invidiously discriminatory because they are employed 'to minimize or cancel out the voting strength of racial or political elements of the voting population.'

Legislative districts deny equal protection if they are gerrymandered so that those living in an area which is experiencing relatively no population growth, represent not only that area but also an area of nearby equal population which is experiencing growth and entitled under reapportionment on the basis of population to its own representation on a substantially increased basis.

During the 1970's most of the population growth of Montgomery County was in the northern part of the County. By drawing the legislative districts in contorted shapes, with appendages or legs hanging down from the main body of the three northern legislative districts (15, 17 and 19), the Governor's Plan provides all of the incumbent Senators and Delegates with Districts in which none of them will face incumbent opposition. Each of the three Senators representing the three northern districts live in the

appendage hanging down from the District into which they have been drawn. Thus, assuming the advantages of incumbency, the representation in the Senate (and to a large extent in the House of Delegates) for the three northern districts (15, 17 and 19) will be by Senators (and Delegates) who do not live in those areas.

By thus drawing the legislative district lines to provide that six incumbent Senators from the southern part of the County will probably represent all of the County, the Governor's Plan denies equal protection under the laws to those persons living in the northern part of the County.

Petitioner has prepared an analysis of the proportions of population and legislative incumbency north and south of a principal cross county highway, Randolph Road, which is attched as Exhibit A to this Memorandum. This analysis dramatically illustrates the denial of

equal representation to the northern part of Montgomery County.

Respectfully submitted,

C. Lawrence Wiser
Suite 400, 10605 Concord Street
Kensington, Maryland 20895
301-949-7870

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Supplemental Memorandum of Petitioner was hand delivered this 14th day of April 1982, to W. Shepherdson Abell, Thomas F. Hogan, and Marianne K. Renjilian of Furey, Doolan, Abell & Hogan, 8401 Connecticut Avenue, Chevy Chase, Maryland, 20815; Stephen H. Sachs, Diana G. Motz, Robert A. Zarnoch, Mary N. Humphries, and Linda H. Lamone of the Office of the Attorney General at 1400 One South Calvert Building, Baltimore, Maryland 21202; Stanely D. Abrams, Attorney for Bruce Goldensohn at Levitan, Ezrin, West, Weinstein & Kerxton, 5454

Wisconsin Avenue, Chevy Chase, Maryland 20815, and Roger W. Titus and Sondra Harans Block, Attorneys for the City of Rockville, at Maryland at Vinson Street, Rockville, Maryland 20850.

/s/
C. Lawrence Wiser

IN THE

COURT OF APPEALS OF MARYLAND

SEPTEMBER TERM, 1982

MISCELLANEOUS NO. 2

C. LAWRENCE WISER

Petitioner

v.

HARRY R. HUGHES

Respondent

IN THE MATTER OF

LEGISLATIVE DISTRICTING OF THE STATE

MEMORANDUM OF PETITIONER IN OPPOSITION TO REPORT OF THE SPECIAL MASTER

C. Lawrence Wiser
Petitioner
Suite 400
10605 Concord Street
Kensington, Maryland 20895
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* * * * * * * * * *

VI. THE FEDERAL CONSTITUTIONAL REQUIREMENT OF EQUAL PROTECTION

Petitioner believes that the gerrymandering of legislative districts created in the Governor's Plan contravenes the Fourteenth Amendment to the Constitution of the United States, specifically due process and equal proection of the laws.

A. The Division of Areas with a Community of Interest Denies Equal Protection Because it Prevents Those Areas Combining to Elect Representatives

Petitioner has previously discussed in this Memorandum the problem of the unnecessary division of communities of interest under the Governor's Plan. Petitioner contends that a division of a community of interest into different districts denies those person in that community of interest equal protection

under the laws because it denies them the opportunity to combine their efforts to elect representatives that reflect views of their community of interest. This is exemplified in the Governor's Plan by the division of the Gaithersburg community of interest into four legislative districts and by the division of the Wheaton community of interest into two districts.

B. Gerrymandering to Protect Incumbent Legislators All Residing in One Area Denies other Areas equal Representation and Equal Protection.

In a leading case, the Supreme Court has ruled that "State legislative districts may be equal or substantially equal in population and still be vulnerable under the Fourteenth Amendment," Gaffney v. Cummings, 412 U.S. 735, 755, 93 S.Ct. 2321, 2330 (1973). The Court went on to say (citing Fortson v. Dorsey, 379 U.S. 433, 439, 855 S.Ct. 498, 501 (1965):

> A districting plan may create multimember districts perfectly acceptable under equal population standards, but invidiously discriminatory because they are employed 'to minimize or cancel out the voting strength of racial or political elements of the voting population.'

Legislative districts deny equal protection if they are gerrymandered so that those living in one area represent not only that area but also other relatively distant areas which are entitled under reapportionment on the basis of population to their own representation on a substantially increased basis.

During the 1970's most of the population growth of Montgomery County was in the northern part of the County. By drawing the legislative districts in contorted shapes, with appendages or legs hanging down from the main body of the three northern legislative districts (15,

17 and 19), the Governor's Plan provides all of the incumbent Senators and Delegates with Districts in which none of them will face incumbent opposition. Each of the three Senators representing the three northern districts live in the appendage hanging down from the District into which they have been drawn. Thus, assuming the advantages of incumbency, the representation in the Senate (and to a large extent in the House of Delegates) for the three northern districts (15, 17 and 19) will be by Senators (and Delegates) who do not live in those areas.

By thus drawing the legislative district lines to provide that six incumbent Senators from the southern part of the County will probably represent all of the County, the Governor's Plan denies equal protection under the laws to those persons living in the northern part of the County.

Petitioner has prepared an analysis of the proportions of population and legislative incumbency north and south of a principal cross county highway, Randolph Road (Appendix C, Petitioner's Exhibit 13). This analysis dramatically illustrates the denial of equal representation to the northern part of Montgomery County (and also illustrates the effect of non-compact districts).

IN THE COURT OF APPEALS OF MARYLAND

IN THE MATTER OF	:	September Term, 1982
LEGISLATIVE	:	Miscellaneous Nos.
DISTRICTING OF	:	2 & 5
THE STATE	:	CONSOLIDATED

REPLY MEMORANDUM OF THE MONTGOMERY COUNTY LEGISLATIVE DELEGATION

Senators Crawford, Denis, Kramer, Levitan, Schweinhaut and Shore, and Delegates Bainum, Boergers, Chasnoff,Forehand, Garrott, Goldwater,

Hixson, Hyatt, Kopp, Koss, Maurer, Morella, Owens, Robertson, Ruben, Sher and Toth, Intervenors, hereinafter referred to collectively as the "Montgomery County Legislative Delegation", by and through W. Shepherdson Abell, Marianne K. Renjilian, and Thomas F. Hogan, their attorneys, respectfully submit this Reply Memorandum for the aid of the Special Master.

In his Supplemental Memorandum submitted on April 14, 1982, Senator Wiser attempted to flesh out his previously unparticularized Fourteenth Amendment claim for alleged denial of equal protection of the laws. Senator Wiser says two things, which are variations on a single theme:

(1) That it is a denial of equal protection to divide what he alleges to be "communities of interest"--giving

Gaithersburg and "Wheaton" as examples[1]/-- because the members of the "community" are deprived of the opportunity to "combine their efforts to elect representatives that reflect their community of

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[1]/ Gaithersburg, an incorporated municipality, is not divided by either the Governor's Plan or the Wiser Plan. There are conflicting allegations about the existence of various communities of interest between the City of Gaithersburg, nearby areas and other municipalities. See Senator Wiser's submissions, Mayor Goldensohn's submissions, the City of Rockville's submissions, the Affidavits of Idamae Garrott and Donald B. Robertson (Exhibits 1-B and 3-B), and the Supplemental Affidavit of Helen L. Koss (Exhibit 4-B) submitted herewith. Insofar as "Wheaton" is concerned, to the extent attempts have been made to define that unincorporated and largely undefined area it is divided by the Wiser Plan as well as the Governor's Plan. See Affidavit of Helen L. Koss (Exhibit 2-B) and Affidavit of Bebe Bailey (Senator Wiser's Exhibit 19), at paragraph 5. The Wiser Plan also divides other communities, such as Olney. (See Exhibit 2-B).

interest"[2]; and

(2) the residents of Montgomery County living north of Randolph Road--a "growth area" according to Senator Wiser--are deprived of equal protection because the incumbent legislators (whom Senator Wiser assumes will all be re-elected)[3] live south of Randolph Road--allegedly in

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[2] The Delegation submits that there is no evidence--and no reason to speculate--that any group will not be able to elect a representative who will reflect their views and be responsive to all his or her constituents, wherever the district lines are drawn. See Supplemental Affidavit of Helen L. Koss (Exhibit 4-B).

[3] This assumption is based on sheer speculation of a type in which the courts have generally been unwilling to indulge. See, e.g., Wendler v. Stone, 250 F. Supp. 838, 840 (S.D. Fla. 1972); and Skolnick v. State Electoral Board of Illinois, 336 F. Supp. 839, 845 (N.D. Ill. 1971) ("Political prognostication is a dangerous and futile exercise").

a "non-growth" area.[4]/

Both of Senator Wiser's contentions rest on the underlying assumption that some interest group--be it a "community" or a "growth area"[5]/--is constitutionally entitled to representation as such and, inferrably, by one of their own. The Delegation submits that Senator Wiser's

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[4]/ Senator Wiser has submitted no data on relative growth rates, but it would in any event be irrelevant for the reasons stated infra. Senator Wiser's "Randolph Road" theory of dividing the County is a novel one, and one which he does not follow in his own Plan. See Supplemental Affidavit of Helen L. Koss (Exhibit 4-B). Randolph Road is not a consistently used dividing line for purposes of census districts, high school districts, councilmanic districts, or recreation areas. See Affidavit of Karl Aro (State's Exhibit 5-B). Mayor Goldenson posits a tripartite division: "up-county", "mid-county", and "down-county"; (Goldensohn Memorandum, pp.16-17).

[5]/ Population growth was of course taken into account in the redistricting process to ensure substantial population equality among districts, but it is clear and unchallenged that the Governor's Plan for Montgomery County achieves substantial population equality.

claims are frivolous; his assumption is wholly without merit and has been clearly rejected by the Supreme Court.

In Whitcomb v. Chavis, 403 U.S. 124, 156-57 (1971), the Supreme Court rejected the notion that "any group with distinctive interests must be represented in legislative halls if it is numerous enough to command at least one seat . . .," warning that such an approach "would spawn endless litigation."

The issue of representation of "communities of interest" was squarely confronted--and rejected--by the United States District Court for the Southern District of Florida in Wendler v. Stone, 350 F.Supp. 838 (1972). The Wendler court, in granting motions to dismiss, stated:

> "The gravamen of their complaint is a challenge to the division of economic, political, ethnic, and social groups within the affected cities, such as the senior

citizens of Miami Beach. It is argued that such alleged division reduces the influence of the vote of such interests, as a group, in the political process.

This claim is likewise nonjusticiable. It carries its own refutation. An endless list of groups with such a community of interest, covering an infinite number of geographic combinations, could be prepared. Those persons sharing an interest on one question would be unlikely to concur in their views on all questions. A court asked to accommodate those sometimes convergent, sometimes divergent, interests certainly cannot look to any judicially discoverable and manageable standards for guidance.

Counsel admitted to the Court that many redistricting plans, all satisfying the one man, one vote requirement, were possible. In such hypothetical plans, boundary lines could undoubtedly be drawn so as to encompass certain allegedly identifiable interest groups. Each plan would, however, exclude or divide certain

other interest groups. The futility of the standard championed by the plaintiffs is readily apparent.

More importantly, however, in our view, the equalization of representation demanded is not constitutionally required. The decision of the Supreme Court in Whitcomb v. Chavis, 403 U.S. 124, 91 S.Ct. 1858, 29 L.Ed.2d 363 (1971), clearly established the principle that interest groups have no constitutional guarantee of representation in legislative halls." 350 F. Supp., at 840. (Emphasis added).

The Supreme Court recently agreed, in City of Mobile v. Bolden, 100 S.Ct. 1490 (1980):

"It is, of course, true that the right of a person to vote on an equal basis with other voters draws much of its significance from the political associations that its exercise reflects, but it is an altogether different matter to conclude that political groups themselves have an independent constitutional claim to representation.

> And the Court's decisions hold squarely that they do not. See United Jewish Organizations v. Carey, 430 U.S. 144, 166-67, id at 179-180 (concurring opinion); White v. Regester, 412 U.S. 755, 765-766; Whitcomb v. Chavis, 403 U.S. 124, 149-150, 153-154, 156-157.
>
> The fact is that the Court has sternly set its face against the claim, however phrased, that the Constitution somehow guarantees proportional representation."

Senator Wiser's claims for proportional representation of any group--however phrased--should, accordingly, be summarily rejected.

The Governor's Plan achieves substantial population equality among districts. There is no allegation of actionable racial, or even religious, ethnic, economic or parti an

discrimination[6]. No group, no voter, is denied access to the political process by the Governor's Plan.[7] As the Wendler court noted, any plan may unite some more- or less-defined interest groups but, in doing so, will inevitably divide others. 350 F.Supp. at 840. The Maryland Constituion, Article III, §5, entrusts the districting process--the choice of where

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[6] Even in cases of racial discrimination, the Supreme Court has held that discriminatory intent must be shown to establish a violation. See City of Mobile v. Bolden, supra. There is no suggestion of any discriminatory intent in this case. Justice Stevens' concurrence in that case, which suggests that gerrymandering aimed at religious, ethnic, economic and political groups as well as at racial minorities is actionable under the Fourteenth Amendment has not been accepted by a majority of the Court; neither has his substitute for the intent requirement ("uncouthness", significant adverse effects and irrationality). The Delegation submits, however, that the Governor's Plan is rational and would pass any of the accepted or proposed tests for constitutionality.

[7] Cf. Chapman v. Meier, 420 U.S. 1 (1973).

to draw the lines--to the Governor and the General Assembly. The Delegation submits that the Governor and the General Assembly have performed their task in a manner fully consistent with both the Maryland Constitution and the United States Constitution. The Special Master and the Court therefore should defer to their choice--and not Senator Wiser's--as to where the lines should be drawn. See Upham v. Seamon, _____ U.S. _____, 50 U.S.L.W. 3800, 3801 (April 1, 1982). The Governor's Plan should be upheld.

Respectfully submitted,

FUREY, DOOLAN, ABELL & HOGAN

By: /s/
W. Shepherdson Abell

By: /s/
Marianne K. Renjilian

By: /s/
Thomas F. Hogan

8401 Connecticut Avenue
Chevy Chase, Maryland 20815
(301) 652-6880

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 19th day of April, 1982, I caused a copy of the foregoing Reply Memorandum and the Supplemental Affidavit of Helen L. Koss (Exhibit 4-B), to be mailed, first class mail, postage pre-paid, to C. Lawrence Wiser, Petitioner, 10605 Concord Street, Suite 400, Kensington, Maryland, 20895; to Stanley Abrams, Esquire, 5454 Wisconsin Avenue, Chevy Chase, Maryland, 20815, Attorney for Petitioner Goldensohn; to Roger W. Titus, Esquire, City Attorney, 502 Suburban Bank Building, 255 N. Washington Street, P.O. Box 1906, Rockville, Maryland, 20850, Attorney for the Mayor and Council of Rockville, Amicus; to Linda Lamone, Assistant Attorney General, 104 Legislative Services Building, 90 State Circle, Annapolis, Maryland, 21401; and to Stephen H. Sachs, Attorney General, Diana G. Motz, Assistant

Attorney General, Robert A. Zarnoch, Assistant Attorney General, and Mary N. Humphries, Assistant Attorney General, 1400 One South Calvert Building, Baltimore, Maryland, 21202.

/s/
Marianne K. Renjilian

IN THE COURT OF APPEALS OF MARYLAND

IN THE MATTER OF	:	September Term, 1982
LEGISLATIVE	:	Miscellaneous Nos.
DISTRICTING OF	:	2 & 5
THE STATE	:	CONSOLIDATED

SUPPLEMENTAL AFFIDAVIT OF HELEN L. KOSS

I, Helen L. Koss, hereby affirm as follows:

1. This Affidavit is made on my personal knowledge; I am not disqualified from being a witness and if called as a witness, I can and will testify competently as hereinafter stated. I am

familiar with the Governor's reapportionment plan and the Plan filed with this Court by Senator Wiser.

2. I have been a member of the House of Delegates of the General Assembly of Maryland since 1971. Since 1979, I have served as Chairman of the Constitutional and Administrative Law Committee. Since that Committee reviews much of the legislation affecting municipalities in Maryland, I have had many opportunities to observe the positions of the cities of Rockville and Gaithersburg on legislation before the General Assembly.

3. To the best of my knowledge, information and belief, as long as I have served in the legislature, there has been agreement between the positions of the City of Rockville and the City of Gaithersburg on the overwhelming majority of issues before the General Assembly affecting Rockville or Gaithersburg or both. In particular, both supported:

(a) Legislation authorizing municipalities to collect license fees;

(b) Legislation affecting cable television;

(c) Legislation affecting the payments from counties to municipalities in recognition of services provided by the municipalities;

(d) Legislation affecting municipal shares of the income tax;

(e) The state role in allocating federal revenue sharing funds;

(f) The pre-emption of municipal legislation by county ordinances (specifically House Bill 1400 and Senate Bill 661, 1982 Session, designed to modify the decision in Forest Heights v. Frank, 291 Md. 331 [1981]);

(g) The authority of municipalities to impose speed limits in school zones;

(h) The so-called "enclave bill," dealing with the procedures by

which municipalities may annex "enclaves" which are not part of those municipalities but are surrounded by municipal territory; and

(i) Legislation affecting the mass transit system for the Washington metropolitan area.

4. The list in 3 above is not intended to be by any means exclusive. In fact, I cannot recall a single piece of legislation on which Rockville and Gaithersburg appeared before the General Assembly on opposite sides, with the possible exception of the location of the outer Beltway.

5. Rockville and Gaithersburg may in fact vie with each from time to time for priority on the list of school construction projects--as may any other two communities in the County, such as Gaithersburg and Montgomery Village. Such rivalry is inherent in the school construction program, but cannot in my

opinion form a rational basis for legislative districting.

6. I have reviewed the Supplemental Memorandum of Petitioner Wiser in Miscellaneous No. 2 and his unverified "Exhibit A" entitled "Population of Montgomery County and Residency of Incumbent Legislators North and South of Randolph Road." I am intimately familiar with Randolph Road, because I have for many years resided in a district spanning both sides of Randolph Road. My residence in fact lies less than two miles from Randolph Road.

7. Contrary to Senator Wiser's assertions, Randolph Road is in my opinion not a natural dividing line between the older and newer developments of Montgomery County. It is not an arterial road. Those roads which might provide natural boundaries within Montgomery County, Interstate 495 (the Beltway) and Interstate 270, have in the past cut

through the middle of legislative districts, rather than forming the boundaries of those districts, in many instances.

8. Senator Wiser's Plan itself fails to follow Randolph Road as the dividing line between his proposed legislative districts 18 and 19.

9. Based on my experience as a legislator and on my long time residence in Montgomery County, I do not believe I have ever previously heard anyone refer to Randolph Road as the natural dividing line between "up-County" and "down-County" residences.

10. In my opinion, a comparison of the proportion of population and residences of incumbent legislators north and south of Randolph Road is irrelevant as a redistricting consideration. I am aware of absolutely no reason why someone who resides south of Randolph Road could not very competently represent voters who

live north of Randolph Road if they elect him or her to do so, and vice versa.

11. It is difficult to generalize about the positions taken by various communities, governmental units and interest groups on legislation before the General Assembly. However, in my opinion, based on my experience in the General Assembly, there is far more likely to be a divergence of interest between rural and urban residents than between "up-County" and "down-County" residents.

12. The fallacy of the division between "up-County" and "down-County" is, in my view, further demonstrated by the "Wedges and Corridors" General Plan for the development of Montgomery County. As the name indicates, this Plan is organized, not on the basis of a horizontal division between the northern and southern portions of the County, but on the basis of wedges and corridors extending radially out from the District

of Columbia. Not coincidentally, this is the general path which historic legislative districts have followed.

I hereby affirm under the penalties of perjury that the contents of the foregoing Affidavit are true and correct to the best of my knowledge, information and belief.

/s/
Helen L. Koss

In the Matter	*	
of the	*	In the
Legislative	*	Court of Appeals
Districting of	*	of Maryland
the State	*	
1982	*	

TO THE HONORABLES, CHIEF JUDGE MURPHY AND THE ASSOCIATE JUDGES OF THE COURT OF APPEALS OF MARYLAND

REPORT OF THE SPECIAL MASTER

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Miscellaneous Petition 5

Petition of Bruce A. Goldensohn

Montgomery County Districts Generally, District 17 Specifically

This Petitioner's attack supports generally the contentions made in Miscellaneous Petition 2 filed by C. Lawrence Wiser previously discussed supra, but particularly attacks District 17 upon the ground that it "fail(s) the Constitutional test of compactness", and "does not give due regard to natural boundaries...in that City of Gaithersburg is separated from its surrounding neighbors...which have a close community of interest with (Gaithersburg);" and is placed in the same District as the City of Rockville...[with] different communities of interest, as well as competitive interests."

The petition avers that by "combining the two largest municipalities within

Montgomery County...into a single legislative district, the votes of citizens are debased and diluted in the election of a representative number of members of the Legislature, who will represent their interests as residents of a municipality as opposed to residents of a separate political subdivision of the State, i.e. a charter county." (Emphasis added.)

The petition concluded by asserting that the plan "was drafted and created by the incumbent senators and delegates of Montgomery County;" and that "accommodation of the incumbent ...delegation violate[d]...Article 76A, Section 7-15."[20]

This petitioner's contentions concerning constitutional deficits under Maryland Constitution Article III, Section

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[20] Incumbent Senators and Delegates of Montgomery County do not fall within the cited sections.

4 have been fully discussed supra.

His contention relating to "community of interest" is without merit. Assuming for the moment that there may be circumstances under which a failure to recognize "communities of interest" may reach constitutional dimensions, it is plain that this is not such a case.

Four claims to "community of interest" are alleged: (a) Wiser's "community of interest" between Rockville and the rural community of District 15; (b) Rockville's rejection of such an idea and assertion of a community of interest only with less affluent sections of District 15 and with two communities north of the City; (c) the Legislative plan asserting a community of interest between the two incorporated municipalities of

Rockville and Gaithersburg[21]; and (c) Gaithersburg's rejection of all of these and its assertion of a community of interest with Montgomery Village.

Cutting through the facade of petitioner's "community of interest" arguments in the attack upon District 17 by the two largest incorporated municipalities, Rockville and Gaithersburg, one stark fact emerges - the question is one of disputed fact. The resolution of this disputed fact is a legislative function that does not give rise to a constitutional issue.

The real thrust of the Rockville-Gaithersburg attack upon their joint placement within District 17 is that each believes that if placed within separate districts, it would be able to exercise greater political influence upon members

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[21] Supported by affidavit of Helen Koss, Exhibit 3B

of the General Assembly in spite of its minority population in such divided districts. Such desires conflict with the spirit if not the letter of the overriding principle of "one person-one vote."

It is recommended that Miscellaneous Petition 5 be dismissed.

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